

May 3, 2010

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5669
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce, we submit this letter in response to the request for information from the Department of Labor (“DOL”) and the Department of Treasury (“Treasury”) regarding lifetime income options in retirement plans. The U.S. Chamber of Commerce is the world’s largest business federation representing more than three million businesses and organizations of every size, sector and region, with substantial membership in all 50 states. These comments have been developed with the input of numerous member companies with an interest in strengthening retirement security.

Introduction

Until recently, retirement planning focused on wealth accumulation. However, as more people are living longer in retirement, there is increased attention on deciding how such wealth should be managed to provide a steady stream of income for the duration of the retirement period. Due to concern about people outliving their retirement savings, there has been more attention given to decumulation: ways to encourage installment payment forms; and ways to make annuities and other lifetime income options more accessible both within qualified plans and the individual market.

As such, we are pleased to respond to this information request. As detailed in our comments below, our members would like to see greater education surrounding lifetime income options and incentives for offering and taking lifetime income options. Nonetheless, we do not believe mandates will be effective or helpful. In addition, many plan sponsors are concerned about increased liabilities that would result from mandates. Consequently, we encourage the DOL and Treasury to provide greater incentives for lifetime income options without burdening plan sponsors with unnecessary mandates by providing clear safe harbors and related guidance.

Comments

Defined Contribution Plans are an Important Component of Retirement Security. We are very concerned about the depiction of defined contribution plans in the preamble to the request for information. The preamble implies that defined contribution plans do not contribute to retirement security. On the contrary, defined contribution plans are a vital part of the retirement landscape. In recent years, defined contribution retirement plans have become increasingly

popular among employers and employees. Approximately 77 million participants are currently covered by more than 650,000 defined contribution plans.¹ These numbers demonstrate that defined contribution plans are attractive not only to employers, but also to workers.

Today, most workers do not spend their entire career with a single employer. This trend has led to a surge of defined contribution plan participants since they offer portability for workers to take their retirement account with them when changing jobs. Participants are able to carry their retirement account balance with them and continue to contribute at their next place of employment.

Moreover, participants have seen success in their investments. In 2005, the net worth of assets in defined contribution plans was valued at almost \$2.8 trillion.² This number has risen to \$4.5 trillion after market activity in 2009.³ Given the financial market downturn at the end of 2008, this net increase of approximately \$1.7 trillion exemplifies the strength of the defined contribution system. Furthermore, individual savings within defined contribution plans can be substantial. According to the Employee Benefit Research Institute, for consistent 401(k) plan participants for the five year period ending December 31, 2008, the average 401(k) account balance was \$86,500 and the median balance was \$43,700 (down from \$114,337 and \$57,933, respectively, at the end of 2007). Individuals in their sixties with thirty years of tenure with their current employer had an average balance of \$179,573 (\$231,880 in 2007).⁴ These balances will be considerably higher for year-end 2009, reflecting the improved markets. This market performance is one of several factors that can be attributed to the steady growth of participation in defined contribution plans.

These facts demonstrate that defined contribution plans are no longer a retirement “supplement,” but a core component of retirement assets.

Plan Sponsors Experience Low Take Up Rates when Lifetime Income Options are Offered.

Very few defined contribution plans offer a lifetime income option. However, even when offered, participants often do not choose a lifetime income option. There are many reasons for this including, but not limited to:

- Lack of education or confusion about how lifetime income options work or the difference among the various products;
- Participants feel that they can manage their own assets and generate better returns on their investments than the interest rates provided in lifetime income products;
- The participant is separating from service but not retiring;
- The plan distribution is only one part of the participants retirement assets (including Social Security which is paid as an annuity);

¹ “Private Pension Plan Bulletin Historical Tables,” U.S. Department of Labor, Employee Benefits Security Administration, p. 1, 5 (March 2010). Data compiled from Form 5500s for the 2007 plan year.

² “Private Pension Plan Bulletin Historical Tables,” (March 2010) p. 13.

³ “Retirement Market Insights 2010,” Spectrem Group (April 2010)

⁴ 401(k) Plan Asset, Allocation, Account Balances, and Loan Activity in 2008, EBRI Issue Brief No. 335, October 2009.

- The participant or his or her spouse is in poor health and the annuity option would not be best because annuity rates do not reflect health status;
- The participant does not understand the market risks associated with managing assets while also drawing on them for expenses;
- Mistrust of leaving money with the employer or a financial institution.

These reasons demonstrate the breadth of issues that participants are considering at the time of distribution and the factors that have to be addressed in order for lifetime income options to become an attractive choice for plan participants. Greater education and information will increase awareness of lifetime income options, but will not address all of the reasons participants do not choose lifetime income products. In addition, distribution of a portion of a participant's account in the form of lifetime income may not be right for every participant, and distribution of all of a participant's account in the form of lifetime income is rarely, if ever, right for any participant. Therefore, the goal should not be for all participants to take a distribution in the form of a lifetime income option. Rather, the focus should be on providing participants with the necessary education and tools to enable them to make the right decision for themselves. As such, rules should provide plan sponsors with the protection and flexibility to educate their employees regarding their options and to offer the best distribution options for its workforce. This will ensure that participants have good information to make an informed choice about the options available to them.

Furthermore, experience has demonstrated that participants are not choosing lifetime income products even when it is offered in the plan. According to a 2008 survey by the Profit Sharing/401k Council of America (PSCA), 21% of defined contribution plans offered a lifetime income option. Within those plans, less than 1% of participants selected a lifetime income distribution option. In defined benefit plans that offer a lump sum payment, over 90% of participants choose this option, even though they must undergo cumbersome spousal waiver procedures to avoid an annuity distribution. Thus, it is reasonable to assume that this opt-out is very likely to be repeated by defined contribution plan participants if a default lifetime income payout mandate is implemented.

Plan Sponsors Have Serious Concerns about Increased Liabilities Associated with Mandating Lifetime Income Options. Employers are increasingly worried about liability issues. While the ultimate resolution of a case may prove that an employer acted appropriately, it is still prohibitively expensive to defend against a lawsuit. Given the increase in ERISA lawsuits recently, this is a very real concern among employers. Therefore, if lifetime income options are required in defined contribution plans, employers are concerned that they will be subject to increased exposure to possible suits based on the choice of lifetime income option that the employer offers.

Therefore, it would be helpful if liability barriers were removed and effective guidance provided, so that employers felt comfortable in making such options as easily available to participants as are investment choices during active working years. To avoid this increased exposure and encourage employers to offer lifetime income options, we have two suggestions. One is to have the DOL provide a safe harbor for plan sponsors worried about potential exposure. There are many ways to address such a safe harbor and the Chamber and its members are ready and willing to provide further information on this idea if it is of interest. The other suggestion is to provide protection, similar to that under Code section 404(c), for the participant's choice of distribution option. Therefore, as long as the employer has followed its fiduciary obligations in choosing a provider, the

participant cannot hold the employer responsible for subsequent performance. Either of these recommendations would ease employer concerns about increased liability and encourage the inclusion of lifetime income options in defined contribution plans. We would be happy to explore either of these options further with you.

Plan Sponsors and Service Providers Should be Encouraged to Provide Information on Lifetime Income Options. In general, Chamber members feel that there should be greater education on lifetime income as a distribution option because participants do not always do what is in their best economic interests. Particularly, since some employers may choose not to offer a lifetime income distribution option, education about the various distribution choices (either distribution from a defined contribution plan or after rollover into an IRA) to plan participants prior to retirement would significantly help plan participants to make informed choices regarding their retirement savings and income.

The goal should be to educate participants about all of their distribution options (lump sum, lifetime income option, rollover to an IRA) and to have them start to think about their financial situation in retirement including whether they have a monthly income from savings, Social Security, benefits from defined benefit plans, etc. The decision about the form of distribution should not be solely whether to take a distribution of plan assets in a lump sum or in an income stream. The answer should be based on a number of factors such as other sources of monthly income, the employee's health, retirement lifestyle, etc.

Plan sponsors currently provide plan participants with valuable information about retirement savings and how much individuals need to save for retirement. Many plan sponsors would also like to provide the tools necessary to help employees decide how to make their retirement savings last. However, there is concern that the plan sponsor may not be the best source for information on lifetime income products. For example, if most employees of the employer are separating from service for reasons other than retirement, the employees will not have any interest in this information. There is concern, moreover, that becoming too involved in this area may increase an employer's fiduciary liabilities without providing an equal benefit in workforce productivity. Also, many plan sponsors do not have sufficient information regarding individual retirement funding issues or various lifetime income options. For these reasons, the Chamber suggests that the DOL provide this information on its web site or in materials that employers can provide to their employees. Moreover, plan sponsors and employers should not incur any fiduciary responsibility for providing to their employees information that was developed by DOL.

Plan sponsors are currently required in benefit statements to notify participants of information on investing that is provided through the DOL. The DOL's website is a good source of investment information for participants of all investing levels. This would also be an appropriate place to include additional information on lifetime income options. In addition to having a reliable repository of information, it would also alleviate employer concerns about increased liabilities since the information is coming from the DOL.

Finally, the Chamber recommends that all approaches to distribution issues be done in a product-neutral manner. Recognizing the need to ensure that participants are not overwhelmed with choices

and receive sound information must be balanced with allowing for continued innovation and growth of financial products.

Lifetime Income Options Should not be a Mandated Distribution Option in Defined

Contribution Plans. Chamber members do not think that all employers are in the best position to offer annuities in their retirement plans and, therefore, oppose lifetime income mandates. Rather, members would appreciate flexibility in providing annuity options and encouraging participants to opt for lifetime income products.

On a practical level, many employers do not offer lifetime income products in defined contribution plans because the take-up rate is so low in defined benefit plans—even with the annuity distribution as the default option. Moreover, many people who are withdrawing money from the plan are not at retirement age, so they are not concerned about payment options. Therefore, many employers view lifetime income options as an issue for rollovers more than a qualified plan issue.

Moreover, there are significant differences between defined benefit and defined contribution plans that warrant a difference in distribution options. Mandating a lifetime income distribution option for participants is viewed by many as fundamentally inconsistent with the spirit of defined contribution plans. In defined benefit plans, the benefit is determined entirely by the employer. The employer bases the benefit formula across the needs of the entire workforce with (understandably) little inclusion of individual differences. Defined contribution plans, however, allow participants significant control over the amount of the benefit that they will receive. Participants choose how much of their salary they will defer and the types of investments in which to put the deferrals. In addition, they are able to change both of these factors throughout their career if they so choose. Both of these choices are based upon the individual needs and character of the participant. Deferral amounts may vary depending on the number of workers in the household, other retirement vehicles in which the worker participates, or cash flow needs, among many, many other reasons. Investment choices vary just as widely depending on the amount of risk the participant is willing to take or the participant's knowledge of investments. Therefore, at the time of distribution, participants should be allowed to maintain this same discretion over their benefits.

In addition, structural differences between defined benefit and defined contribution argue against mandating a lifetime income product as a distribution option within a defined contribution plan. Defined benefit plans are based on a formula that is meant to be paid out in an annuity-type format and plan sponsors make contributions to the plan based on paying out an annuity. Therefore, a participant who takes an annuity will not be impacted by daily market fluctuations at the time of distribution. Defined contribution benefits, however, are based on the amount in the account at the time of distribution. Similarly situated participants may have very different account balances due to their investment choices and the timing of the distribution. As a result, similarly situated participants would end up with different annuity benefits due to differences in their account balances at the time of retirement. Therefore, lifetime income options should be left to the discretion of plan sponsors as to whether it is a viable distribution option in its defined contribution plan.

Furthermore, a participant can always purchase a lifetime income product after the plan assets are distributed. If the plan sponsor does not provide a lifetime income distribution option, those participants who want one can rollover their balance into an IRA and purchase a lifetime income

option through a broker dealer. Those who prefer a lump sum option can maintain that option without actively having to request it.

For these reasons, the Chamber opposes the mandating lifetime income products as a distribution choice and opposes proposals such as the Automatic Trial Income proposal issued by the Hamilton Project.⁵ Chamber members feel that the burdens associated with mandating such distribution options in defined contribution plans would far outweigh the benefits. Any defined contribution plan sponsor offering an annuity option must manage related administrative and compliance requirements. For example, a waiver of the qualified and joint survivor annuity cannot be done electronically and, therefore, requires significant administrative resources. To keep the defined contribution system healthy and growing, especially among smaller employers, it is important to avoid new regulations that imposes additional administrative responsibilities, compliance obligations and fiduciary liabilities that would accompany a mandate to offer an annuity.

However, the Chamber does support incentives for the purchase of lifetime income products. Americans for Secure Retirement have a proposal that would create a tax exemption for individuals for one-half of the income payments from annuities up to \$20,000. Legislation has been introduced in both the House and Senate.⁶ The House legislation also applies to annuities offered in qualified plans. The Chamber is a member of Americans for Secure Retirement and supports an exemption for annuities offered both through qualified plans and the individual market. Moreover, we encourage Congress to consider tax incentives for all vehicles that provide guaranteed lifetime income. Providing tax incentives in a product neutral manner would spur innovation that would be beneficial to participants and their retirement security.

The Minimum Required Distribution Rules Interfere with Long-Term Retirement Planning.

The request for information specifically asks how the required minimum distribution (RMD) rules relate to longevity insurance.⁷ Longevity insurance is purchased with a single premium and held as a plan or IRA investment, but only pays benefits at a later date, such as at age 85. Given the aging of the US population, the Chamber believes that this product could become an attractive investment for plan participants. However, the RMD rules discourage its use. Under current rules, the RMD rules apply to an investment in longevity insurance held in a qualified plan or an IRA when the owner turns age 70 ½, even though the owner is not receiving a benefit (and may never receive a benefit).

⁵ The Hamilton Project Paper, authored by William G. Gale and J. Mark Iwry of the Brookings Institution, David C. John of The Heritage Foundation, and Lina Walker of the Retirement Security Project, available at http://www.brookings.edu/papers/2008/~media/Files/rc/papers/2008/06_annuities_gale/06_annuities_gale_pb.pdf. The proposal would require 401(k) plans (or similar accounts) to offer an automatic two-year trial of monthly payments to give retirees the opportunity to experience the benefits of monthly income. Assets accumulated may be fully or partially automatically enrolled, and retirees would have the option to opt out of the trial both before and after the two-year trial period.

⁶ H.R. 2748, Retirement Security Needs Lifetime Pay Act of 2009; S. 1297, Retirement Security for Life Act of 2009.

⁷ Question 28

H.R. 2784 sponsored by Representatives Earl Pomeroy and Ginny Brown-Waite, includes a provision that amends the RMD rules to exclude the investment in the longevity insurance premium from the RMD requirements. The Chamber believes that this legislation could remove disincentives to purchasing longevity insurance.

In addition, the Chamber recommends an overall review of the RMD rules. At the time the rules were implemented, the retirement landscape was very different. Today, people who reach the age of 70 can reasonably be expected to live to age 90 and beyond. Therefore, forcing individuals to lose the advantage of tax deferred earnings accumulation and divert principle to pay income tax can seriously erode retirement security. The minimum distribution rules are complex and some participants, fearing onerous penalties, withdraw even more than is required under the rules. They can force inappropriately timed conversion of investments to cash, a reality recognized by the Congress when it recently suspended the requirement because of the 2008 market meltdown.

Conclusion

We thank you for the opportunity to share our experiences and concerns with you. As plan sponsors and service providers, we have a strong interest in promoting all aspects of retirement security. We believe that changes can be made to the system without unduly burdening any party and with maintaining needed flexibility. We view these comments as a starting dialogue on the distribution phase of retirement security and look forward to working with both the DOL and Treasury and other interested parties in addressing the concerns we have raised in this comment letter.

We appreciate your consideration of these comments and look forward to continuing to work with you on this important endeavor.

Sincerely,



Randy K. Johnson
Senior Vice President
Labor, Immigration & Employee
Benefits
U.S. Chamber of Commerce



Aliya Wong
Executive Director, Retirement Policy
Labor, Immigration, & Employee
Benefits
U.S. Chamber of Commerce